UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID LANE JOHNSON, Plaintiff, v. NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, ET AL., Defendants.	Civil Action No. 1:17-cv-05131-RJS

DEFENDANT NFLPA'S REPLY MEMORANDUM
IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As Johnson admits, "[w]hether the NFLPA provided [him] the complete [2015 PES] Policy is the ultimate fact relevant to Johnson's claim under Section 104 of the LMRDA." Johnson Opposition, ECF No. 151 ("Opposition" or "Opp'n") at 13; *see also* Order (Oct. 23, 2018), ECF No. 131, at 1 (the lone issue remaining is "whether the NFLPA's October 16 document production has mooted [Johnson's LMRDA] claim"). Yet, most of Johnson's Opposition is irrelevant to this "ultimate fact." Indeed, Johnson devotes most of his brief to trying to exhume and recast a retaliation claim that the Court previously dismissed and that, in any event, Johnson never pleaded under the LMRDA. Johnson also persists in his efforts to re-arbitrate his disciplinary appeal, despite the Court having previously confirmed the Arbitration Award.

With respect to the sole, dispositive fact issue about the sufficiency of the NFLPA's document production, Johnson has come forward with nothing new to say, let alone probative evidence sufficient to satisfy his burden to establish a *genuine* dispute of *material* fact. Instead, Johnson recycles his unsupported arguments about four ostensibly missing documents without any rejoinder to the NFLPA's showing that each one of these documents was either produced, does not exist, or was not collectively-bargained. Johnson also blithely accuses the NFLPA attorneys who attested to the completeness of the October 16 production of perjury, but such rank (and implausible) conjecture is not a valid basis to oppose summary judgment.

Johnson's response to the NFLPA's showing that he lacks Article III standing is similarly defective as a matter of law. The affirmed Award now renders undisputed the fact that all of Johnson's alleged injuries were the self-inflicted consequence of his violating the 2015 Policy. Access to all of the collectively-bargained documents in the world would not change this undisputed fact. Even *if* the NFLPA had committed a technical violation of the LMRDA (it did not), Johnson's claimed injuries still would not be "fairly traceable" to it. Nor could any such

injuries be redressed by a "favorable judicial decision." Johnson thus lacks standing to assert any LMRDA claim as a matter of law. This is an independent basis to grant summary judgment.

ARGUMENT

Nowhere in the Opposition does Johnson deny that the NFLPA's Motion for Summary Judgment, ECF No. 135 ("MSJ"), presents sufficient evidence to shift the burden to Johnson to come forward with evidence of a genuine and material factual dispute. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). Johnson, however, has not met his burden because he rests on "conclusory allegations and unsubstantiated speculation." *Garnica v. Edwards*, 72 F. Supp. 3d 411, 416 (S.D.N.Y. 2014).

The NFLPA responds below to each of Johnson's unsupported factual contentions. At the outset, however, we note that Johnson's Opposition confirms that he does not dispute the following material facts: the NFLPA produced to Johnson the documents described in the MSJ concerning the 2015 PES Policy; the documents at issue under his LMRDA claim are not the entirety of the 2015 NFL-NFLPA CBA, but only those documents relevant to the 2015 PES Policy[1]; and the confirmed Award establishes that Johnson violated the 2015 PES Policy.

I. JOHNSON HAS NOT MET HIS BURDEN TO ESTABLISH A GENUINE DISPUTE ABOUT THE COMPLETENESS OF THE NFLPA'S PRODUCTION

A. There Is No Genuine Dispute About the Four Allegedly Withheld Documents

Simply put, Johnson's claimed incredulity towards the Saxon and McPhee declarations has zero weight on summary judgment. *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 579 (2d Cir. 1969) (plaintiff must do more than "swing [his] bludgeon wildly" when challenging statements made in an affidavit; he must "be precise" and "state specifically . . . the grounds" for

[1] The 2015 NFL-NFLPA CBA spans hundreds of pages (all available to anyone with an internet connection) and covers countless subjects that are wholly irrelevant to this dispute.

his objection); *Garnica*, 72 F. Supp. 3d at 416 (granting defendant's motion for summary judgment where plaintiff failed to provide "some hard evidence showing that [his] version of events [was] not wholly fanciful") (citation omitted); *cf.* Order (Jan. 9, 2019), ECF No. 150 ("Rule 56 Order"), at 3 ("the credibility of NFLPA employees . . . do[es] not bear upon the narrow issue of justiciability at the heart of the NFLPA's [summary judgment] motion.").[2] Once the Court casts aside Johnson's unsupported argument that the representations of the NFLPA and its lawyers are false, all that remains of the Opposition is rehashed rhetoric about four documents that are supposedly missing from the NFLPA's October 16 production.

First, with respect to the "CFT Amendment" (Opp'n at 4), Johnson does not dispute that the NFLPA has produced this document multiple times. Instead, he argues that "the NFLPA still has not explained how an amendment to the 2014 policy applies to the 2015 Policy applicable here." *Id.* The explanation, in fact, resides on pages 10 and 11 of the NFLPA's MSJ, *i.e.*, that the CFT Amendment by its express terms applies on a going-forward basis.

Second, as to the supposed "Amendment Regarding the Number of Arbitrators" (Opp'n at

[2] Johnson's attempt to discredit Saxon and McPhee because they attest to their "belie[fs]" about the sufficiency of the NFLPA's document production (Opp'n at 9) is another red herring. Testifying to one's belief—*i.e.*, one's best information and understanding—is all any witness can do. Johnson's claim that the Saxon and McPhee declarations lack sufficient foundation is similarly misguided. *Id.* at 9-10. Saxon attested that "the NFLPA asked [him] to review and identify documents that could be subject to disclosure under the [LMRDA] with respect to the 2015 NFL-NFLPA Collective Bargaining Agreement" and, from that universe, he identified a subset of documents relating to the 2015 Policy. ECF No. 138 ¶ 2-3. McPhee, in turn, attested that, as the NFLPA's Associate General Counsel, she is "involved with administering the [2015 Policy]." ECF No. 139 ¶ 1. In stark contrast to Johnson's unsubstantiated attacks on these declarations, his own attestations about the completeness of the NFLPA's document production are—on their face—self-contradictory. *Compare* Johnson 56.1 Counter to Material Statement of Facts ¶¶ 4-7, ECF No. 152 (asserting that, absent an opportunity to depose Saxon and McPhee, Johnson cannot attest to the credibility of their attestations about the completeness of the NFLPA's document production) *with* Decl. of Lane Johnson, ECF No. 151-1 (repeatedly and affirmatively attesting that he did not receive a complete document production from the NFLPA).

4), Johnson's Opposition confirms that he *does not dispute the NFLPA's evidence that there presently are three arbitrators*. MSJ at 5, 8-9. This is dispositive. For all of Johnson's shrill accusations and unsubstantiated arguments about an undisclosed amendment purportedly reducing the number of arbitrators under the Policy, the undisputed fact that there are *three* arbitrators confirms that there never was any amendment from three-to-two arbitrators under the Policy.[3]

Third, with regard to the allegedly "Missing Policy Protocols and Procedures" (Opp'n at 6), Johnson never denies—and thus it is undisputed—that the collection procedures and testing protocols he is complaining about are *laboratory* documents, *not* collectively-bargained documents. Rather, the linchpin of Johnson's argument is that "***[d]ocuments*** referenced and incorporated into a collective bargaining agreement also become part of the agreement." Opp'n at 12 (citing OLMS Interpretative Manual, ECF No. 151-5 § 110.300) (emphasis added). But, even if the Court were bound by the Manual, Johnson's "quotation" of it is a sleight of hand. Section 110.300 actually states: "In addition to the basic agreement, any subsequent agreement or amendment, oral or written, which modifies the basic agreement becomes a part of the collective bargaining agreement. Furthermore, all ***agreements*** which are incorporated by reference into the basic working agreement become a part of it." ECF No. 151-5 § 110.300 (emphasis added). In other words, the Manual provides that collectively-bargained "***agreements***" are deemed incorporated by reference into a CBA—not any and all "documents," as Johnson asserts.[4]

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[3] This is not "inconsistent" with prior statements by the NFL or NFLPA that the bargaining parties had mutually agreed that two arbitrators were proving to be sufficient at the time of Johnson's arbitration. Opp'n at 3-5. As this Court noted, it took the NFL and NFLPA "six months to choose the first arbitrator, three more months to agree upon a second, and eighteen months more to select a third." Dismissal Order at 12.

[4] Although, as described above, applying the actual terms of OLMS Interpretative Manual is unavailing to Johnson, he supplies no authority that the Court is bound to follow the Manual. Indeed, the Manual's guidance is at odds with the Supreme Court's seminal decision in

Laboratory protocols are indisputably UCLA's proprietary documents—not the NFL's and NFLPA's collectively-bargained "agreements."

Fourth, with respect to the putative "Amendment to the Two-Year Testing Period" (Opp'n at 8-9), the responses to Johnson's first argument ("the Policy does not say Dr. Lombardo decides") and third argument ("if Dr. Lombardo is responsible for applying and designating the reasonable-cause testing period, an agreement (oral or written) should exist reflecting this responsibility") are one and the same. The 2015 Policy expressly sets forth the NFLPA and NFL's agreement that the Policy "will be directed by the Independent Administrator" who "shall have the sole discretion to make determinations, consistent with the terms of th[e] Policy" concerning a broad array of subjects, including reasonable cause testing. ECF No. 39-1 §§ 2.1, 3.1. Johnson's remaining argument—that "the Court previously determined the NFLPA, with the NFL (not Dr. Lombardo), reached an agreement regarding the reasonable cause testing period"—is yet another sleight of hand. The Court's actual statement concerned the Arbitrator's findings about the NFLPA and NFL's "*interpretation*" of the 2015 Policy (Dismissal Order at 17 (emphasis added)), which is critically different from either the Arbitrator or the Court holding that there was a *modification* to the 2015 Policy (there was no such finding, and there was no such modification). A review of the Arbitral Award, Section VI.A, confirms that the NFLPA and NFL simply agreed with Dr. Lombardo's advice about how to proceed. ECF No. 39-2 ¶¶ 6.15, 6.19.[5] And the 2015 Policy

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579-581 (1960), which describes how, in the context of collective bargaining agreements, the common law of the shop controls because it is neither possible nor practical to reduce to writing every aspect of the parties' course of dealing.

[5] In fact, Arbitrator Carter held that Dr. Lombardo's interpretation of "how long [Johnson] understood he was to remain in the [reasonable cause] program" was "consistent with Mr. Johnson's understanding." Arb. Award, ECF No. 39-2 ¶ 6.16.

leaves no doubt that the parties had empowered Dr. Lombardo with such authority.

In sum, Johnson has failed to raise a genuine dispute of material fact concerning any of the four allegedly missing documents. As the foregoing establishes, this would be true even if the NFLPA had not submitted the Saxon and McPhee declarations, which additionally—and independently—corroborate the undisputed fact that the documents Johnson has put at issue either were already produced, do not exist, or were not collectively-bargained or part of the Policy.

B. Johnson's Remaining Arguments Fail As A Matter of Law

Relying on a single opinion, Johnson adopts the incredible position that whenever a "plaintiff attests that he has not received a copy of the collective bargaining agreement, summary judgment is improper." Opp'n at 13 (citing *Leavey v. Int'l Bhd. of Teamsters-Theatrical Teamsters Local Union No. 817*, No. 13-cv-0705 (NSR), 2015 U.S. Dist. LEXIS 135509, *16-17 (S.D.N.Y. Oct. 5, 2015) ("*Leavey*")). Needless to say, *Leavey* does not upend decades of summary judgment jurisprudence and render defeating summary judgment a self-fulfilling prophecy for any LMRDA plaintiff who merely says so. In *Leavey*, the plaintiff had identified *specific*, *collectively-bargained* agreements and presented evidence that not all of them had been disclosed. *Leavey,* at *15-16. Here, there is no dispute about the NFLPA's October 16 document production, nor can there be any genuine dispute that the four other documents Johnson has identified were either produced, do not exist, or were not collectively-bargained or part of the CBA (*supra*). *Leavey* is thus inapposite.

Finally, Johnson's self-described "practical argument" against summary judgment (Opp'n at 15) is in fact anathema to practicality. No union would look at this case—an expensive (46 submissions and counting), multi-jurisdiction, protracted, public dispute with a member—as a relished roadmap for dealing with requests for collective bargaining agreements. The NFLPA endeavored to provide Johnson with whatever collectively-bargained documents he wanted for his appeal—but the NFLPA cannot provide documents that do not exist or that it does not possess.

II. JOHNSON LACKS ARTICLE III STANDING

Wholly independent from the undisputed fact that the NFLPA mooted Johnson's LMRDA claim with its October 16 production, Johnson lacks standing. His conclusory argument that "the NFLPA injured Johnson by refusing to provide him a complete copy of the Policy upon request" (Opp'n at 16) fails because the confirmed Arbitral Award establishes that all of Johnson's alleged injuries—*e.g.*, lost wages and contractual penalties—flow from his violation of the Policy, not anything the Union did or didn't provide. To give just one example, considering that the Court has already ruled that the presence of two-instead-of-three arbitrators did not cause any injury to Johnson (Dismissal Order at 12-13), then even *if* the NFLPA had failed to provide Johnson with a mythical and non-existent piece of paper memorializing a three-to-two-arbitrator amendment, it could not have injured Johnson as a matter of law. This analysis holds true for all of the four allegedly missing documents and exemplifies what remains of Johnson's LMRDA claim—immaterial, manufactured, semantic arguments that do not create a justiciable controversy.

Indeed, such claims about a "bare procedural violation" of the LMRDA—even if true, which the NFLPA denies—would not be "fairly traceable" to Johnson's alleged injuries as required to confer standing.[6] *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-50 (2016), *as revised* (May 24, 2016); *Katz v. Donna Karan Co., L.L.C.*, 872 F.3d 114, 116 (2d Cir. 2017). Standing also requires that a plaintiff's injury "is likely to be redressed by a favorable judicial

[6] Johnson's claim that he "could not have 'had a full and fair hearing' absent a complete copy of the Policy"—Opp'n at 15-16 (citing *Smith v. American Federation of Musicians*, No. 68 CIV 2937, 80 L.R.R.M. 3063, 1972 U.S. Dist. LEXIS 13898 (S.D.N.Y. May 4, 1972))—has already been rejected, twice. First by Arbitrator Carter (ECF No. 39-2 ¶¶ 6.36-6.42), and then again by the Court (Dismissal Order at 14-15). And, in any event, the *dicta* in *Smith* is off-point. *Smith,* 1972 U.S. Dist. LEXIS 13898, *17-18 (no ruling on fairness of plaintiff's hearing; commenting in *dicta* that plaintiff may have been denied a fair hearing when he was not furnished with the specific charges against him and was denied access to an entire collective bargaining agreement).

decision." *Spokeo*, 136 S. Ct. at 1547. But even if the Court were to compel production of all collectively-bargained documents relating to the 2015 Policy—which the NFLPA has already done—it would do nothing to "redress" Johnson's claimed injuries, further establishing his lack of standing.

III. JOHNSON'S "RETALIATION" CLAIM HAS ALREADY BEEN DISMISSED

Because Johnson's LMRDA claim is both meritless and moot, he persists in recasting it as a "retaliation" claim. Opp'n at 17. This too fails to stave off summary judgment.

For starters, as established in the MSJ, Johnson did not even *attempt* to plead retaliation under the LMRDA in either of his complaints. MSJ at 12-14. Instead, Johnson invoked Section 104 of the LMRDA, and Section 104 alone—*i.e.*, the provision concerning a union providing collectively-bargained documents to members. *Id.* Johnson never *mentioned* in his complaints the LMRDA sections dealing with retaliation which now suddenly appear in his Opposition. To be sure, Johnson alleged retaliation, but as part-and-parcel of the duty of fair representation claim that the Court dismissed. Dismissal Order at 15-16.

Even if, however, Johnson had adequately provided notice of and pled an LMRDA retaliation claim, the Court has already ruled that it was dismissed: "Plaintiff's claims against the NFLPA for 'disciplin[ing] or retaliat[ing] against Johnson for asserting his rights under the LMRDA' were dismissed by this Court as part of Johnson's duty of fair representation claim." Rule 56 Order at 2. Johnson claims the Court is wrong "because the NFLPA did not seek dismissal of the claim" (Opp'n at 19), but this too is false,[7] and the Court's ruling is the law of the case.

[7] In fact, the NFLPA specifically referenced Johnson's threadbare LMRDA retaliation allegation in its motion to dismiss *all* claims, noting that Johnson's "'examples' of 'retaliation' are nothing more than an attempt to recycle his other allegations and label them as 'retaliatory' without explication beyond the incoherent claim that the NFLPA was retaliating 'because of its public dispute with Johnson.'" NFLPA Mem. in Supp. of Mot. to Dismiss, ECF No. 109, at 19-20.

All that said, even if there ever had been an LMRDA retaliation claim, or if there were anything left of such a claim now, summary judgment should be entered against it. According to Johnson, he must "establish the following: (1) his conduct constituted free speech in violation of the LMRDA; (2) that the speech was a cause for the Union taking action against him; and (3) damages." Opp'n at 19-20 (citing *Leavey*). At the threshold, Johnson's purported "free-speech right when he spoke out publically against the NFLPA and said, among other things, 'the NFLPA does not stand up for players'" (*id.* at 16) does not qualify as free speech in violation of the LMRDA as a matter of law. Johnson's own authority provides that LMRDA-protected speech must be "made in the context of the union democratic process, *i.e.* political speech *primarily addressed to other union members*, rather than free speech at large." *Leavey,* at *21-22. Johnson provides no evidence that his speech meets this test and it is obvious on the face of Johnson's declaration that it does not. Johnson Decl. ¶ 2. Moreover, the portion of the Court's DFR analysis concluding that the NFLPA took no retaliatory action against Johnson (Dismissal Order at 15-16) would apply with equal force to any LMRDA retaliation claim.

In sum, no matter how the Court chooses to analyze Johnson's purported LMRDA retaliation claim, it either was never pled, was dismissed on the pleadings, or should be rejected now on summary judgment.

IV. JOHNSON IS NOT ENTITLED TO A JURY TRIAL AS A MATTER OF LAW

Finally, even if summary judgment were denied, Johnson could not try his LMRDA claim before a jury. *First*, as established in the MSJ, Johnson waived his right to a jury trial. MSJ at 15-16. His amended complaint did not revive this right because the FAC did not add or alter any retaliation claim; rather, Johnson's amendments focused on his failed attempt to show "that his

claims are properly before this Court [in Ohio]." ECF No. 43, at 1.[8]

Second, the Court has already held that Section 104 of the LMRDA affords a plaintiff equitable relief only, *i.e.*, "a copy of the agreement and side letters in question." Dismissal Order at 17 n.3. In its MSJ, the NFLPA represented that it has been unable to locate any case in which a Court awarded damages under Section 104 (MSJ at 17), and in his Opposition, Johnson identifies no relevant authority to the contrary.[9] With only equitable relief available, "no right to a jury attaches." *CSC Holdings, Inc. v. Westchester Terrace at Crisfield Condo.*, 235 F. Supp. 2d 243, 264 (S.D.N.Y. Oct. 21, 2002).

CONCLUSION

For all the reasons set forth above, summary judgment should be granted against Johnson's remaining LMRDA claim(s) against the NFLPA and the case should be closed.

[8] Among other things, Johnson's purported LMRDA retaliation claim was not a new allegation in the FAC. The LMRDA section of Johnson's original complaint included the same conclusory allegation that the NFLPA had "retaliated" against him. ECF No. 1 ¶ 277. The NFLPA has provided a blackline between the original and amended complaints so that the Court can see the amendments for itself. *See* Blackline Comparing FAC with Original Complaint attached hereto as Exhibits E-1 through E-4 to the Declaration of Jeffrey L. Kessler.

[9] Johnson argues that "[a]t least one court" "contemplated" damages under Section 104 (Opp'n at 22), but *Baker v. Gen. Motors Corp.*, 745 F. Supp. 1275, 1278 (N.D. Ohio 1990) "contemplates" only whether the statute of limitations had lapsed (which it had). Johnson's remaining cases are even more off-point because they concern sections of the LMRDA not at issue here. *Hall v. Cole*, 412 U.S. 1, 8-9 (1973) (attorney's fees available for a claim brought under LMRDA section 101(a)(2)); *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella*, 350 F.3d 73, 79, 90-91 (2d Cir. 2003) (damages available under LMRDA section 101(a)(5)); *Berg v. Watson*, 417 F. Supp. 806, 812-13 (S.D.N.Y. 1976) (punitive damages available under LMRDA section 101(a)(5) "where actual malice or reckless indifference to the rights of the aggrieved union member have been displayed"); *Quinn v. Di Giulian*, 739 F.2d 637, 646-47 (D.C. Cir. 1984) (plaintiff entitled to jury trial on damages under LMRDA sections 101 and 609).

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